HAROLD B. WILEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~[illegible]~~ 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATHAN WITT,
9 East 40th Street,
Borough of Manhattan,
City of New York,

LEONARD B. BOUDIN,
25 Broad Street,
Borough of Manhattan,
City of New York,

Attorneys for Petitioner.

VICTOR RABINOWITZ,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
The Statute and Constitutional Provisions Involved	2
Statement of the Case	2
Questions Presented	4
Reasons for Granting the Writ	6
Conclusion	17
Appendix A. 18 U. S. C. § 3486. Compelled testimony tending to incriminate witnesses; immunity	19
Appendix B. Opinion	22

TABLE OF CASES CITED

Adams v. Maryland, 347 U. S. 179	15
Ballman v. Fagin, 200 U. S. 186	14
Brown v. Walker, 161 U. S. 591	4, 9, 12, 13, 14, 15
Carlson v. United States, 209 F. 2d 209 (C. A. 1, 1954)	6
Commonwealth v. Nelson, 377 Pa. 58, cert. grant. sub nom. Pennsylvania v. Nelson, 348 U. S. 814	15
Doyle v. Hofstadter, 257 N. Y. 244	9, 15
Feldman v. United States, 322 U. S. 487	12
Garland, Ex Parte, 4 Wall. 333, 71 U. S. 333	9
Gordon v. U. S., 117 U. S. 697	10
Gould v. Gould, 201 App. Div. (N. Y.) 674	14
Hale v. Henkel, 201 U. S. 43	12

	Page
Hayburn's Case, 2 Dall. 409 (U. S. 1792)	10
Jack v. Kansas, 199 U. S. 372	12
Marcello v. United States, 196 Fed. 2d 437	14
Nelson v. Wyndham, 105 Atl. 2nd 750	15
Pennsylvania v. Nelson, 348 U. S. 814	15
People v. Lay, 195 Mich. 47	14
Prentis v. Atlantic Coast Line Co., 211 U. S. 210	10
Smith v. United States, 337 U. S. 137	12
State ex rel. Mitchell v. Kelly, 71 So. 2d 887, 897 (Fla. 1954)	14
United Electrical & Radio Machine Workers of America, Matter of, 111 F. Supp. 858	11
United States v. Bridges, 199 Fed. 2d 811, rev'sd 346 U. S. 209	46
United States v. Bryan, 339 U. S. 323	12
United States v. Di Carlo, 102 F. Supp. 597	14
U. S. v. Hiss, 185 F. 2d 246, (2d Cir.), cert. den. 343 U. S. 907	11
U. S. v. Lattimore, 385 F. 2d 847, decided July 8, 1954	11, 16
U. S. v. Murdock, 284 U. S. 141	13, 14
United States v. Remington, 191 F. 2d 246 (2nd Cir.), cert. den. 343 U. S. 907	11, 16
United States v. Saline Bank, 1 Pet. 100	14
Watson, In re, 293 Mich. 263, 285	14

STATUTES CITED

	Page
Communist Control Act of 1954	16
Immunity Act of 1954	16
18 U. S. C. 3486	2
28 U. S. C. Sec. 1254(1)	1
Public Law 600, 83rd Congress, 68 Stat. 833, amended 18 U. S. C. 3486	2
Public Law 637, 83rd Congress, 2nd Sess., Sec. 5(a)	16
United States Constitution:	
Article II, Sec. 2	9
Article III	2
Article IV	15
First Amendment	16
Fifth Amendment	2, 13, 17

AUTHORITIES AND COMMENTARIES, ETC. CITED

	Page
Attorney General's Address at Twentieth Century General Congress, General Society of Mayflower Descendants, Plymouth, Massachusetts, September 13, 1954, pp. 5-6	3
Hearings before Subcommittee to Investigate the Administration of the Internal Security Acts and other International Security Laws, Committee on the Judiciary, United States Senate, 83rd Congress, 1st Sess., on Interlocking Subversion in Government Departments, Part 16, pp. 1110-1141 (1953)	3

PAGE

Hearings on Institute of Pacific Relations before Sub-committee on Internal Security, 82nd Cong., 1st and 2nd Sess., pp. 3523, 3526 16

H. Rep. No. 2606, 83rd Cong., 2nd Sess., p. 4 7

J. A. C. Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 Temple Law Quarterly 57, 194 (1934-35) 14

John M. Kernochan, Director of the Legislative Drafting Research Fund of Columbia University, II Organized Crime and Law Enforcement, pp. 168-9 9

Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. Law Review 1, 35 (1949) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court, reported at 128 F. Supp. 617, is set forth in the Appendix to Appellant's Brief in the Court of Appeals, pages 36a to 54a. The opinion of the Court of Appeals has not yet been reported, but is set forth in the same Appendix, pages 71a to 77a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1955 (App. 68a). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

The Statute and Constitutional Provisions Involved

This case involves the Immunity Act of 1954, Public Law 600, 83rd Cong., 68 Stat. 833, 18 U. S. C. § 3486; Article III and the First and Fifth Amendments to the Constitution of the United States. The text of the statute is set forth in App. A to this petition.*

Statement of the Case

On August 20, 1954, Congress enacted Public Law 600, 83rd Cong., 68 Stat. 833, amending 18 U. S. C. 3486. It established a procedure to compel witnesses before congressional committees, grand juries and courts to testify, notwithstanding their proper assertion of the constitutional privilege under the Fifth Amendment, by an order of the United States District Court. The witness would thereby be granted immunity from prosecution, penalties and forfeitures; as indicated below, the precise scope of the immunity is uncertain. This is the first statute granting such power to the courts in the history of this country.

On November 4, 1954, the United States Attorney for the Southern District of New York made a written application to the District Court, upon notice to petitioner, for an order under the statute directing him to testify before a federal grand jury (App. 2a). The application merely stated that the grand jury was investigating the commission of wartime espionage and that petitioner had declined to answer certain specified questions. The application recited the "judgment" of the United States Attorney that immunity be granted and the "approval" of the Attorney

* App. A and App. B refer respectively to the statute and Opinions of the Court of Appeals set forth in Appendices A and B to this Petition. All other references to the Appendix (or App.) are to the Appendix to Appellant's Brief in the Court of Appeals.

General. It was accompanied by the latter's letter of approval (App. 7a).

Petitioner filed an affidavit in opposition to the application (App. 9a-28a-c). Respondent filed answering affidavits (App. 28d-37a) and, upon the request of the District Court, an affidavit of good faith (App. 8a-9a).

Petitioner's affidavit, which was not substantially disputed with respect to the material allegations, set forth the following: Petitioner and other former officials of the United States Treasury Department were accused of espionage by one Elizabeth Bentley in 1945 and thereafter. Since 1947, petitioner has been interrogated once by the Federal Bureau of Investigation, four times by congressional committees and three times by federal grand juries on this subject. Despite petitioner's repeated denials of espionage, the Attorney General of the United States made a similar public accusation.* Petitioner's affidavit shows that this espionage charge has been made by the Attorney General into a major political issue and that a denial today of the espionage charges would probably lead to an unfounded indictment of him for perjury.

The government introduced no evidence in denial of petitioner's charges or otherwise, in support of the application. The District Court denied petitioner's request that it examine the grand jury minutes to determine whether the grand jury was engaged in a bona fide investigation into crime.

Instead, on February 1, 1955, the District Judge rendered his decision sustaining the constitutionality of the statute, holding that the court played no part in the grant of immunity and that the government was under no duty to

* Hearings before Subcommittee to Investigate the Administration of the Internal Security Acts and other International Security laws, Committee on the Judiciary, United States Senate, 83rd Congress, 1st Sess., on Interlocking Subversion in Government Departments, Part 16, pp. 1110-1141 (1953).

produce evidence in support of its application (App. 36a). He overruled the constitutional and other objections made by petitioner to certain of the questions.

The District Court order, entered on February 8, 1955, made no findings of fact with respect to the necessity or propriety of the testimony (App., 55a), and it directed petitioner to appear and to answer pursuant to the statute not only the questions set forth in the application but all instated questions on the same subject. The court did not make an explicit grant of immunity in its order nor did it indicate precisely what immunity was given to the witness compelled thus to testify.

On March 8, 1955, petitioner upon declining to answer the questions put to him by the grand jury was convicted of contempt in the District Court. The court entered judgment sentencing him to six months' imprisonment with the right to purge (App. 68a).

The Court of Appeals affirmed the conviction, each judge writing a separate opinion. These opinions indicated that the court felt itself bound by this Court's decision in *Brown* v. *Walker*, 161 U. S. 591, although as an original proposition it would have decided the matter in favor of petitioner, especially in view of the factual situation presented here (App. B).

Questions Presented

1. Whether under the statute immunity is granted by the Attorney General alone, or by the court upon the application of the government.

2. Whether the grant of immunity by the court is a constitutional exercise of a judicial function, and, if so,

whether the court may grant such immunity without a record in support thereof.

3. Whether the constitutional privilege of the Fifth Amendment must not be read literally to prohibit any compulsion to testify notwithstanding any promises of immunity.

4. Whether the statutory grant of immunity is not illusory since the witness, by testifying, will subject himself to penalties and forfeitures arising from the federal, state, institutional and group sanctions today imposed upon political dissenters.

5. Whether the constitutional privilege does not guarantee petitioner protection against incrimination under state law and, if so, whether Congress intended to and could constitutionally effectuate this guaranty by delegating the immunity power to the United States Attorney.

6. Whether petitioner was properly directed to testify where the Government's purpose was to compel testimony for which he would be indicted for perjury.

7. Whether the questions as to political affiliations were not immaterial to an inquiry into espionage and were not violative of the First Amendment.

8. Whether the order below complied with the Fifth Amendment and the statute in view of the absence from the order of an express grant of immunity and the refusal of the District Court to define the scope of the immunity grant.

Reasons for Granting the Writ

1. The statute does give the District Court the power to grant immunity.

In national security cases the United States Attorney "upon the approval of the Attorney General, shall make application to the Court that the witness shall be instructed to testify * * * and upon order of the Court such witness shall not be excused from testifying. * * *"

The government claims and the courts below apparently agree that the function of the Court on such an application is the same as the function of the Court in any situation in which application of the immunity statute is not involved. See for example: *Carlson v. United States*, 209 F. 2d 209 (C. A. 1, 1954) and companion cases.

Petitioner, on the other hand, urges that the statutory language above quoted was intended not merely to restate the law of the *Carlson* case but to give to the District Court the duty of approving the propriety of the grant of immunity. Indeed, this precise point was the subject of extensive discussion in the 82nd and 83rd Congresses, and Congress considered and expressly rejected a series of bills which would have called for the procedure which the government claims is applicable here. Moreover, those bills were rejected precisely *because* they did not require court approval of a grant of immunity.

Between 1951 and 1954 Congress had before it a series of proposals providing for a grant of immunity to witnesses before congressional committees, grand juries and courts. From the very beginning a sharp difference of opinion arose on the question of what government agency or combination of agencies was to be assigned the duty of approving the grant of immunity. These differences of opinion as well as doubts as to the constitutionality of any bill prevented passage of an immunity law in the 82nd Congress.

In the first session of the 81st Congress, S. 1649 confined immunity to witnesses before congressional committees. It passed the Senate. That bill was referred to a subcommittee of the Judiciary Committee of the House, as was H. R. 6899, introduced by Rep. Keating. It applied not only to witnesses before congressional committees, but also to witnesses before grand juries and courts; furthermore, it gave to the Attorney General the sole power to grant immunity, providing:

> "Whenever, in the judgment of the Attorney General, the testimony of any witness * * * in any case or proceeding before any grand jury or Court of the United States, is necessary to the public interest, such witness shall not be excused from testifying * * *; but such witness shall not be prosecuted * * *."

No reference was made to a court order, because no court order granting immunity was contemplated.

The subcommittee of the House Judiciary Committee to which the Keating bill was referred amended it. *But the Keating bill was rejected by the full committee.* Instead an amended bill was recommended by the committee and ultimately passed by Congress. The Committee's amendment substituted the language which now appears in the statute, and explained its amendment by saying:

> "The full committee amendment requires that application be made to a court after approval of the Attorney General that the witness be instructed to testify or produce evidence whereas under H. R. 6899 [the Keating bill] only the approval of the Attorney General was necessary prior to granting immunity." (H. Rep. No. 2606, 81st Cong., 2d Sess., p. 4).

The Committee discussed the procedure to be followed in the case of a recalcitrant witness before a committee:

> "Finally, before the immunity is actually granted to the witness, the approval of the United States District Court wherein the inquiry is being conducted is to be obtained.

"In cases before a grand jury or a court similar precaution exists" (*id.*, p. 8).

Prior to the inception of this litigation and the submission of the government brief in the District Court, there was no confusion at all as to what this law meant. Rep. Keating, who was the manager for the House Judiciary Committee of the bill reported out by it, said, in the course of the congressional debate, that a grant of immunity "requires approval of both the prosecutor and the Court" (100 Cong. Rec. 12603). Similar views were expressed by Rep. Celler (*id.* at 12604) and by Rep. Hyde (*id.* at 12607).

Several months after the passage of the law, but before the inception of this litigation, the Attorney General likewise agreed that immunity "*will be granted by a Federal District Judge, after advice from the Attorney General,* upon petition of a United States Attorney or a representative of Congress." (Address at Twentieth Century General Congress, General Society of Mayflower Descendants, Plymouth, Massachusetts, September 13, 1954, pp. 5-6; italics supplied.)

The District Court sought to distinguish the language used in Sections (a) and (b) of the statute, relating to congressional committees, from the language used in subdivision (c) of the statute relating to grand juries. The court, however, overlooked the fact that the bill ultimately reported was a combination of two separate bills (S. 16 and H. R. 6899) and hence included two separate formulations. Further, the court assumed a preciseness in statutory language which rarely exists and which certainly could not be expected in view of the haste with which the bill, several times quickly revised, went through with limited debate.

The District Court further found that the statutory history was itself ambiguous, a finding inexplicable in view of the clear intent expressed over and over again both in the Judiciary Committee report and on the floor of the House itself.

Congress expressly rejected a statute which gave exclusive power to grant immunity to the Attorney General. The government thus seeks to impose upon Congress a statute which it expressly and repeatedly refused to pass, solely to transform an unconstitutional statute into a constitutional one.

2. The power to grant immunity is not a judicial function; if it be held to be a judicial function it was improperly exercised here because no record was made in the District Court in support of an order granting immunity.

If the grant of immunity be viewed as a pardon, it is clear that the power to grant pardons rests exclusively in the President of the United States and cannot be delegated (Constitution, Art. II, Section 2; *Ex Parte Garland*, 4 Wall. 333, 71 U. S. 333). If the grant of immunity be construed as a grant of amnesty for crimes committed, it is probably a legislative function. This seems to have been the reasoning of the court in *Brown v. Walker*, 161 U. S. 591, and is certainly the core of the decision of Chief Judge Cardozo in *Doyle v. Hofstadter*, 257 N. Y. 244.

The determination of whether immunity ought to be granted involves consideration of many important policy problems. These have been summarized by John M. Kaufman, Director of the Legislative Drafting Research Fund of Columbia University:

> "Is the evidence expectable from W. (this witness) so important to this proceeding, and is this proceeding so important, that W. should now be compelled to give his evidence and so be immunized, in spite of the offense for which he may go unpunished and in spite of the damage his immunity may do to present or future efforts to enforce the criminal laws of this state or to the wider public interest in a just, orderly society?" (II Organized Crime and Law Enforcement, pp. 168-9).

Clearly this is not the stuff of judicial decisions. We need merely call this Court's attention to such classic cases as *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210; *Hayburn's Case*, 2 Dall 409 (U. S. 1792) and *Gordon v. U. S.*, 117 U. S. 697.

It is significant that none of the immunity statutes either in the federal government or, so far as we know, in state governments, gives to a court any function in the grant of immunity.

Even if the granting of immunity by a court be held to be a judicial function, a reversal of the conviction here is still required under the statute and the due process clause of the Constitution. For the District Court had no facts at all upon which a decision granting immunity could possibly have been reached. To the extent that any record was made it was made by petitioner, who affirmatively showed that the application should be denied.

The government's failure to present evidence in support of a grant of immunity to petitioner was not an oversight; it was the consequence of the government's contention that such evidence was not required under the statute. The District Court was never told what reasons, in the government's view, justified any grant of immunity. It did not even examine the grand jury minutes. It was merely given the United States Attorney's "judgment" that immunity should be granted and the Attorney General's "approval" of that judgment, predicated upon undisclosed facts, assuming that any existed at all.

A court of the United States is not an auxiliary of the Department of Justice. Its decisions cannot be determined by the judgment of prosecuting officials, without more. It cannot judicially act upon an application when not a single relevant factor is presented in support thereof.

Petitioner, on the other hand, submitted a detailed affidavit showing why the immunity power should not be exercised by the court (App. 9a-28a). We will not summarize

that affidavit here except to note that it alleges that the investigation which the grand jury was undertaking was political in nature and part of a program on which the present administration had embarked to convince the American people that petitioner and other employees of the preceding administration were guilty of espionage.

Hence, petitioner had reasonable ground to fear the possibility that his testimony before the grand jury, even under a grant of immunity, might result in an indictment for perjury arising from the testimony itself. We recognize that a witness may not ordinarily assert his constitutional privilege for fear of an indictment for perjury arising from his testimony. But the question here is quite different, namely, should a witness, faced with the extraordinary danger shown on this record, be required to furnish the occasion for his perjury prosecution? This is not a fanciful fear. It must be viewed against the recent history of the misuse of grand juries and the adoption by the government of techniques under which persons who cannot be prosecuted for substantive crimes are trapped into testimony which is the basis for perjury indictments. (See the concurring opinion of Chief Judge Clark below (App. B); also *U. S.* v. *Hiss*, 185 F. 2d 822, cert. den. 340 U. S. 948; *U. S.* v. *Remington*, 191 F. 2d 246 (2d Cir.), cert. den. 343 U. S. 907; *U. S.* v. *Lattimore*, 215 F. 2d 847, decided July 8, 1954; see *Matter of United Electrical & Radio Machine Workers of America*, 111 F. Supp. 858) on the extraordinary evolvement today of the grand jury as a political non judicial instrument.

3. The statute, as the present chairman of the House Judiciary Committee well said, "bristles with constitutional snarls and questions" (100 Cong. Rec. 12605). A major one is whether the constitutional privilege of the Fifth Amendment is not to be read literally. This would mean that no person can be compelled to testify against himself regardless of the considerations offered. It would not preclude the voluntary exchange of immunity for information.

This was the view of four dissenting members of this Court in *Brown v. Walker*, *supra*, and of Judge Galston in the court below (App. B).

Of course, this Court in *Brown v. Walker* came to a contrary conclusion which has been accepted without critical analysis in several later decisions involving federal immunity laws, such as *Hale v. Henkel*, 201 U. S. 43.* We think that the reasoning of the minority in *Brown v. Walker*, the language of the Constitution and the required liberality of its interpretation, justify reconsideration of the compulsory-bargain interpretation made by a majority of this Court nearly sixty years ago.

4. The statute cannot, in today's circumstances, give true immunity against "legal detriment" within the meaning of the Constitution and the *majority* opinion in *Brown v. Walker*.

This case therefore requires not the repudiation of the decision in that case, as the District Court thought, but its proper and realistic application to the legal, economic, social and political sanctions operative upon the political dissenter today compelled to reveal his views. It was this point which met with acceptance by each member of the Court of Appeals who felt that the matter should be considered by this Court.

These sanctions are so powerful in today's legal, social and economic climate that they render illusory the so-called immunity against prosecution. They strike at the ability of the witness to earn a livelihood for himself and his family; he literally has a problem of survival because so

* There was no occasion for reviewing the matter in cases (1) enforcing state immunity laws such as *Jack v. Kansas*, 199 U. S. 372; (2) reversing convictions based upon testimony given under federal immunity laws, *Smith v. United States*, 337 U. S. 137; (3) involving congressional contempt issues where discussion of immunity was clearly dictum, *United States v. Bryan*, 339 U. S. 323, or (4) involving federal use of state compelled testimony, *Feldman v. United States*, 322 U. S. 487.

many areas of employment are controlled today by government, either directly or indirectly, and few are the employers who are not critically influenced by government opinion. They strike, too, at the witness' right to travel in pursuit of a livelihood, or for pleasure or education. They even affect his freedom from detention upon the declaration of a national emergency. A summary of these penalties and forfeitures, far more serious than mere imprisonment for crime, is set forth in Judge Frank's opinion, footnote 1 (App. B).

As we re-read the court's opinion in *Brown* v. *Walker*, *supra*, we are convinced that it would unanimously have recognized the illusory nature of the immunity offered appellant under this statute. It must be remembered that the court was openly skeptical of how Brown could suffer any personal odium from his employer's violation of the Interstate Commerce Act. In the present case we are not talking about odium and disgrace, the issue which divided the court in *Brown* v. *Walker*, but the imposition of the extraordinary sanctions employed today against political dissenters.

5. Another constitutional defect of this law is that the witness remains liable to state prosecution for crime. This raises most important problems in the construction of the constitutional privilege of the Fifth Amendment, in the administration of criminal justice and in state-federal relations under the Constitution. They have never been thoroughly assessed by this Court, either in *U. S.* v. *Murdock*, 284 U. S. 141, or in the subsequent cases which followed, without analyzing, that decision.

This issue involves three preliminary determinations: (a) Does the constitutional privilege protect the federal witness against divulging matters tending to incriminate under state law; (b) Does the statute purport to and did Congress intend to prohibit state prosecutions; (c) Does Congress have such power under the Constitution?

(a) A construction of the constitutional privilege which would deny that this is one nation geographically and

politically would be absurd. For the federal government to compel self-accusation leading to state criminal prosecution is to deny the realities of our federal system of government and the collaboration between state and federal government particularly in the area of subversive activities.

Long before the witnesses' problem became so acute this Court through Chief Justice Marshall and Mr. Justice Holmes rejected this insular theory of immunity (*United States* v. *Saline Bank*, 1 Pet. 100, and *Ballman* v. *Fagin*, 200 U. S. 186). Indeed, *Brown* v. *Walker* adopts the theory that the federal government has an obligation, hence a power, to control state prosecutions. However, a series of cases culminating in the *Murdock* case did develop the double-sovereignty theory. Each of them was actually based upon the absence of any real danger of prosecution by the other sovereignty, and mistakenly relied upon the English cases which involved different nations, ignorance of foreign law, no real danger, or all three. *Murdock* was actually a decision by default, the appellee not seeking to justify his claim of danger of state incrimination, and it cannot withstand critical evaluation by this Court. See: J. A. C. Grant, *Immunity From Compulsory Self-Incrimination in a Federal System of Government*, 9 Temple Law Quarterly 57, 194 (1934-5); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. Law Review 1, 39 (1949).

The state courts have increasingly in recent years recognized the invalidity of the double-sovereignty rule and the federal courts have likewise moved in that direction. *People* v. *Ligi*, 193 Mich. 17; *In re Watson*, 293 Mich. 263, 285; *Gould* v. *Gould*, 201 App. Div. (N. Y.) 674; *State ex rel. Mitchell* v. *Kelly*, 71 So. 2d 887, 897 (Fla. 1954); *United States* v. *Di Carlo*, 102 F. Supp. 597. See also *Marcello* v. *United States*, 196 Fed. 2d 437.

(b) The statute, on its face, prohibits state use of the federally compelled testimony, but not state prosecution with respect to the subject of the testimony. It is by no

means clear what Congress intended in view of the provisions of and Senate debates on S. 16, the modifications suggested by *Adams* v. *Maryland*, 347 U. S. 179, and the differing views of the House Judiciary Committee. Hence the uncertainty of Representatives Celler and Dodd which must be resolved by this Court's interpretation of the statute (100 Cong. Rec. 12606).

(c) But if the District Court's construction is correct and all state prosecutions are prohibited by the immunity grant, very serious questions of federal power are involved. This Court has never before or since *Brown* v. *Walker* suggested the existence of that great federal power.* Instead it has principally rested (even in *Brown* v. *Walker*) upon the unlikelihood of state prosecutions. That argument cannot be made today with the states vigorously competing with the federal government often for the same victims, as in *Commonwealth* v. *Nelson*, 377 Pa. 58, cert. grant. sub nom. *Pennsylvania* v. *Nelson*, 348 U. S. 814; *Nelson* v. *Wyman*, 105 Atl. 2nd 756.

The District Court's reliance upon the principles of federal supersedure was unsound: (1) Supersedure by substantive regulation occupying the field under Article VI of the Constitution is very different from supersedure by exercise of the mere power of inquiry. None of the classic reasons for supersedure exist in this situation, particularly since "immunity is not an implied or inherent incident of a power to investigate". *Dingle* v. *Hotstadter*, *supra*. (2) Nor would this be the case of Congress occupying the field: rather it would be a prosecutor's suspension, in a particular case, of the enforcement of a state law, raising, in addition, the issue of an unlawful delegation of power.

6. The court also has before it for the first time for consideration the propriety of a grand jury inquiry into political party membership in the guise of an inquiry into

* Doubt as to the existence of such power was expressed to the Senate by John W. Davis, Philip B. Perlman and other eminent lawyers (99 Cong. Rec. 4742-3, 8343-8353).

espionage. The cases relied upon by the District Court, which involve the right of the House Un-American Activities Committee to investigate political propaganda are not relevant because (a) a grand jury is limited to investigations of crime, not of propaganda, and (b) courts have been reluctant to interfere with a coordinate branch of the government. In determining whether testimony should be compelled here, this Court must decide whether the federal courts will permit the juries under their supervision to harass minority groups.

Further, First Amendment rights aside, inquiries into this subject are not *bona fide* investigations of crime, because it is not a crime to be a member of the Communist Party. These inquiries are sources of entrapment, because of the vagueness of the concept of membership in a political party (*United States v. Remington, supra*). See also *Hearings on Institute of Pacific Relations* before Subcommittee on Internal Security, 82nd Cong., 1st and 2nd Sess., pp. 3523; 3526, where Dr. Owen Lattimore and the Internal Security Subcommittee had considerable difficulty in reaching a definition of that term. The new Communist Control Act of 1954 (Public Law 637, 83rd Cong., 2nd Sess., Sec. 5) sets forth fourteen criteria of Communist Party membership which accentuate the seriousness of the problem. Even before this statute, the views of a witness on the subject of trade with China were considered relevant to a jury's determination of Communist Party membership (*United States v. Bridges*, 199 Fed. 2d 811, rev'sd 346 U. S. 209). Respondent's ready use of such elastic terms as "a sympathizer or any other kind of promoter of Communism or Communist interest" is notorious (*U. S. v. Lattimore, supra*).

7. The District Court was originally of the opinion that "the order should contain a very clear and unequivocal grant of the immunity." But respondent argued that "the matter

* This appears in the Stenographic Minutes of the Hearing before the District Court which were submitted to the court below and will be filed with the Clerk of this Court.

of the extent of the immunity which will accrue to [petitioner] by his testimony is after all not directly at issue now. That question will only arise should an attempt later be made to prosecute [petitioner]." * As a result, the order contains no grant of immunity nor even a reference to its scope.

Thus, the so-called immunity statute which began with uncertainty ends, as intended by the government, in even greater uncertainty. It promises vague benefits, creates such hazards and leaves the witness so helpless and ignorant of his fate that the order to testify cannot stand as a valid direction to surrender the historic privilege guaranteed petitioner by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN WITT,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

VICTOR RABINOWITZ,
of Counsel.

---

* This statement appears in the Government's memorandum in the District Court in Opposition to the Counter-Order, p. 6, which likewise will be filed with the Clerk of this Court.

APPENDIX A

18 U. S. C. § 3486

Compelled testimony tending to incriminate witnesses; immunity.

(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee

concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212 (a) (27), (28), (29) or 241 (a) (6), (7) or 313 (a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the pro-

visions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

APPENDIX B

Opinion.

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

No. 268 OCTOBER TERM, 1954

Argued March 16, 1955 Decided April 4, 1955

Docket No. 23555

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM LUDWIG UELMANN,
Appellant.

Before:

CLARK, Chief Judge, FRANK, Circuit Judge, and GALSTON, District Judges.

Appeal from a judgment for the United States District Court for the Southern District of New York, entered by Judge Weinfeld. AFFIRMED.

J. Edward Lumbard, United States Attorney for the Southern District of New York, for appellee.

Nathan Witt and Leonard B. Boudin (Victor Rabinowitz, of counsel), for appellant.

FRANK, Circuit Judge:

The facts are fully stated in Judge Weinfeld's excellent opinion, E. Supp. , the reasoning and conclusions of which we adopt.

It is well to add a few words about defendant's contention concerning the doctrine of Brown v. Walker, 161 U. S. 591, which held that the Fifth Amendment privilege against self-incrimination relates solely to testimony which might lead to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen.[1] We are not prepared to say that this suggestion lacks all merit. But our possible views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new doctrinal trends in that Court's opinions, and we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D. C.

Affirmed.

[1] Defendant's brief states the following:

"The Internal Security Act (64 Stat. 987 (1950), 50 U. S. C. Secs. 740 et. seq., federal executive orders, and current loyalty procedures prohibit the employment of so-called subversives in government or defense facilities and make it unlawful for them to apply for or use passports. If the President declares the existence of 'an internal security emergency,' the Attorney General can intern anyone as to whom 'there is reasonable ground to believe that such person will probably engage in, or probably will conspire with others to engage in acts of espionage or sabotage.' (50 U. S. C. 812, 813).

"Employment as a longshoreman or in the privately owned merchant marine is subject to governmental screening (64 Stat. 428, 1950; 50 U. S. C. Sec. 191). Since June 1954 the Defense Department has promulgated an elaborate series of security regulations providing for the undesirable discharge of persons inducted into the Armed Forces under the Selective Service Acts for associations antedating their induction with the consequent disgrace and economic injury. (See, for example, Department of the Army, Special Regulations S. R. 600-220-1). It may reasonably be estimated that at least 15 million people are affected by security regulations imposed by the federal government.

"It is inconceivable that the government would license political dissenters to operate radio stations, would give them govern-

ment contracts; or permit their employment in government jobs, defense plants, or other industries whose employment is controlled or regulated by it. The recently enacted statute which purports to deprive of citizenship persons convicted of Smith Act violations (Public Law, 83rd Cong., 2d Sess. (1954)) may be the precursor of extension to persons compelled to make such admissions before congressional committees, and grand juries.

"Obviously the immunity statute cannot relieve of these disabilities those who testify pursuant to its provisions. Certainly the Act was not intended to permit those who admit Communist Party membership before a grand jury thereby to become eligible for passports, for employment in the government or in defense facilities, for broadcasting station licenses, for retention in the armed forces and the right to remain outside concentration camps. All of the disabilities created by statute will exist just as effectively whether or not the immunity offered by the statute is, in fact, effective. Therefore, true immunity is not intended nor can it be given by the law. It could be argued, of course, that some of those disabilities might exist upon the basis of secret government information or might arise from the witness' assertion of his constitutional privilege. Without conceding the legality of the disabilities in either case, their existence does not mitigate the forfeiture arising from the compulsory disclosure or show that true immunity is given.

"In addition, there are innumerable state laws and municipal ordinances requiring registration. There are teacher's oath laws for loyalty and security purposes and there are political conditions of employment in state educational institutions and other state agencies. (See, e.g., N. Y. Unconsolidated Laws, Chapter 14).

"The total punitive impact of these local regulations upon the witness compelled by federal authority to testify is truly terrifying. If the witness, admitting political guilt, is subjected to these local laws, he is receiving a meaningless 'immunity.' He has in fact surrendered his right to local employment and his freedom from local harassment by regulation or investigating committee, precisely because of such revelations. This dilemma points up the mockery of the 'immunity' concept in relation to 'subversive activities' today.

"In addition to the formal governmental sanctions, those exercised by the community and by private groups are so tremendous as to challenge an attempt at brief discussion. They include expulsion from labor unions, loss of private employment, discrimination in housing and schooling and public approbrium.

"These sanctions are not generally regarded in the United States as reason for invoking the constitutional privilege. How-

ever, it is significant that in an analogous period of religious oppression, the 18th Century, the English equity courts allowed witnesses to be silent where admissions of papacy would result in property loss (Harrison v. Southcote and Mohehead, 2 Ves. sen. 389, 28 Eng. Rep. 249, 252 (Ch. 1751)), or where ecclesiastical censure would follow (Finch v. Finch, 2 Ves. sen. 491, 28 Eng. Rep. 315 (Ch. 1752)), or where a parliamentary seat was at stake (Honeywood v. Selwin, 3 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744)).

"Where the effect of political heresy is as serious as it is today, the dissenter is subject to penalties and forfeitures which, if anything, are more drastic than even criminal prosecutions. This is not the place for a complete review of the employment opportunities of a political dissenter in the present political atmosphere. It is sufficient to say that government employment, federal, state or local, is effectively closed to such a person; that employment in a defense plant, in the entertainment industry, in a private educational institution, on a newspaper, in the advertising industry, in the merchant marine, as a longshoreman, and many similar occupations, is effectively closed. Only the most menial and low-paying occupations are now available to many persons who have been branded as subversive by congressional committees, administrative agencies, or the daily press. Indeed, it might well be said that to many such persons the threat of criminal prosecution is the least of the concerns which face a man who is unable to pursue the occupation for which he has been trained.

"The beneficent purpose of the constitutional privilege cannot be achieved unless it is interpreted and applied in the light of the dangers today confronting the witness in a political case. Viewed in context, the statute does not give the witness the immunity to which he is constitutionally entitled."

---

* Cf. Taylor, Grand Inquest (1955), 217-228, 296-300; Griswold, The Fifth Amendment Today (1955), 80-81.

---

* See Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 217-218 (C. A. 2):

"Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty cautiously to be sure, to follow not to [illegible] it."

See also Picard v. United Aircraft Corp., 128 F. (2d) 632, 636 (C. A. 2); Judge Parker's opinion in Barnette v. West Virginia Board of Education, 47 F. Supp. 251, 252-253.

CLARK, Chief Judge (concurring):

I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890s. And serious commentators have found this new statute peculiarly disturbing in policy and in law. Griswold, The Fifth Amendment Today 80-81 (1955); Taylor, Grand Inquest 217-221, 296-300 (1955); Barth, Government by Investigation 130-134 (1955). It undermines and so far forth nullifies one of the basic differences between our justice and that of systems we condemn, namely the principle that the individual shall not be forced to condemn himself. Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms. And realistically viewed there is much in the defendant's contention that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer. Convictions so obtained and punishment thus decreed cannot satisfy either the needs or the ideology of a democratic country committed to respect and toleration for dissident minorities. But I can see no escape from the Supreme Court decisions so carefully analyzed by Judge Weinfeld which, while they stand, are binding on us.

GAUSON, District Judge (concurring).

If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment. However, it would appear that the authorities support the contention that Congress has the power to compel testimony by the enactment of an immunity statute which provides an immunity co-extensive with privilege against self-incrimination. Brown v. Walker, 161 U. S. 591; Smith v. United States, 337 U. S. 137. Secondly, that being so, consistently it can be argued that the statute is not invalid for failure expressly to grant immunity from state prosecution. United States v. Murdock, 284 U. S. 141; Feldman v. United States, 322 U. S. 487. See also Mack v. Kansas, 199 U. S. 372.

The good faith of the Attorney General when he acts under Section 3486(c) should be assumed.